

## Politics and Law Testing Policy Regulations Based on Substantive Justice

**Kun Budianto**

**Universitas Islam Negeri Raden Fatah Palembang, Indonesia**

**Email: [kunbudianto\\_uin@radenfatah.ac.id](mailto:kunbudianto_uin@radenfatah.ac.id)**

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### **Abstract**

*This study aims to analyze the legal-political aspects of policy regulation testing in achieving substantive justice. It focuses on the analysis of: (a) standards and parameters related to policy regulation testing based on discretionary powers, and (b) legal-political aspects concerning policy regulation testing based on substantive justice. This research adopts a legal doctrinal approach emphasizing conceptual and legislative frameworks. The findings assert three standards and parameters for policy regulation testing: firstly, fundamental standards and parameters referring to Administrative Law of Procedure (AUPB). In this aspect, AUPB needs to be linked to societal harms to serve as a benchmark for policy regulation. Secondly, standards and parameters for policy regulation testing should align with the concept of PMH in civil law, requiring that the tested policy regulation directly impacts societal losses. Thirdly, standards and parameters for policy regulation testing should consider authority, substance, and procedure aspects, ensuring regulations are made by competent authorities, with appropriate substance, and adhering to specific procedures. The legal-political dimension of policy regulation testing based on substantive justice necessitates the revision of the 2019 Supreme Court Regulation on PMH to provide specific regulations regarding policy regulation testing, including clarification on standards and parameters. The revision aims to enhance the effectiveness of policy regulation testing as part of the government's Tortious Acts testing, thereby facilitating procedural processes and efforts to promote substantive justice.*

## **I. Introduction**

Executive power in a country has a central and important authority, especially with regard to the formulation of public policy(Suwardi & Sugiyarti, 2024). Public policy itself is actually the implementation of the political will of the government which is formulated practically so that it can be applied directly in society(Mustakim , Syafrida, Warsito, 2024). Public policy itself is generally related to the direct needs of the community, so that the preparation of public policy must explain a policy and its relevance to the needs of the community. Because it focuses more on the needs and interests of the community, it is often found that public policies are formulated by not referring to the provisions of existing laws and regulations(Sidin, 2023).

Public policies that often do not refer to the provisions of existing laws and regulations can generally be understood because sometimes laws and regulations only regulate in general and do not even specifically pay attention to the specific needs of the community(Triputro et al., 2023). Public policies that often do not refer to the provisions of the legislation are also commonly formulated in a Policy Regulation (beleidsregel) based on the discretionary authority of the institution or official making it(Gusti et al., 2021). Discretion as the basis for the formulation of Policy Regulations is a certain action or arrangement by institutions or State Administrative Officials (hereinafter referred to as Officials) which is oriented to fulfill the legal needs of the community when the laws and regulations do not clearly and explicitly regulate it(Suhartono, 2019). Because it is not based on the terms of laws and regulations, Policy Regulations (beleidsregel) based on discretionary authority often cause conflicts with laws and regulations and often also cause legal implications in the community.

In the context of legislative science, Policy Regulations in general cannot be categorized as statutory regulations because Policy Regulations are basically products of Official discretion and are also based on public policy considerations(Arifin, 2021). Even so, until 2023, in the Supreme Court itself there have been attempts to review Policy Regulations with different decisions, namely from six reviews of Policy Regulations in the Supreme Court, there are four decisions that accept and consider Policy Regulations as part of statutory regulations because they have the same legal implications as statutory

regulations, while the other two decisions state that the Supreme Court does not have the authority to adjudicate Policy Regulations because they are not statutory regulations so they are not the authority of the Supreme Court (Al-Fatih et al., 2023).

Apart from the problems in the Supreme Court above, in 2019, the Supreme Court had formulated Supreme Court Regulation No. 2 of 2019 concerning Guidelines for Dispute Resolution of Government Actions and the Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad) (hereinafter referred to as PMH Regulation 2019) which substantially emphasizes that the public can file a lawsuit related to state administrative actions that harm the community. State administrative legal actions or actions that harm the public can be in the form of factual actions or legal actions carried out by Officials. (Bima, 2023). This actually implies that the presence of Perma PMH 2019 has actually emphasized the orientation of testing Policy Regulations as the competence of the State Administrative Court (PTUN).

From the description above, it can be seen that the presence of Perma PMH 2019 has emphasized efforts to test Policy Regulations that are considered to have harmed the community. Even so, the regulation in Perma PMH 2019 still does not emphasize what standards and parameters are used to test a Policy Regulation that is considered to have harmed the community. In general, Perma PMH 2019 only confirms that one of the touchstones is the General Principles of Good Governance (AUPB) so that in addition to AUPB, other standards and parameters must be emphasized to test Policy Regulations so that substantive justice is optimally realized in society. This research is oriented towards an analysis related to the legal politics of Policy Regulation testing in realizing substantive justice. Legal politics in this research is interpreted as lines of legal policy that are expected in the future to be determined or formulated to improve the current law. In relation to the aspect of substantive justice, this is intended to ensure that the review of Policy

Regulations is oriented to explore aspects of justice in society and not only on formal-procedural aspects. This is also to accommodate the formulation of Policy Regulations that are based on discretionary authority and oriented towards public policy so that they often do not refer to statutory regulations. From this description, this research focuses on analyzing related to: (a) standards and parameters related to the testing of Policy Regulations based on discretionary authority and (b) legal politics related to testing Policy Regulations based on substantive justice.

Research that discusses Policy Regulations and their testing efforts has actually been carried out by several previous researchers, such as: (i) research conducted by Situmorang, *et.,al.* (2023) which discusses the existence of the Supreme Court Circular Letter related to aspects of insolvency(Situmorang et al., 2023). The newness of the research is that the existence of Circular Letters as Policy Regulations actually raises the problem of its testing, especially when the maker of the Circular Letter as a Policy Regulation is the Supreme Court, which is an institution of judicial power. The next research was conducted by (ii) Pamungkas dan Asmorojati (2023) with analysis in the form of acting authority in formulating Policy Regulations (Agil Pamungkas & Wahyu Asmorojati, 2023). The novelty of this research analysis is that the authority of acting officials in formulating Policy Regulations is generally permitted as long as it does not conflict with the laws and regulations above it and is based on authority. Further research was conducted by Putra (2024) which discusses the ideal formulation of testing Policy Regulations(Maha Putra, 2024). The novelty of this research is that ideally the testing of Policy Regulations is through executive review based on the principle of *contrarius actus*. Although at first glance the Putra's (2024) research similar to this research, but the main difference is in the focus of the research where this research emphasizes the aspect of substantive justice-based Policy Regulation that emphasizes the function of judicial institutions or judicial power.

From the description of previous research above, this research is original because the discussion related to testing Policy Regulations based on substantive justice along with its standards and parameters has actually never been comprehensively analyzed by the three previous researchers.

## 2. Research Method

This research is a doctrinal legal research or normative legal research with the focus of analysis, namely the legal politics of testing Policy Regulations based on substantive justice(Eka N.A.M. Sihombing, 2022)(Hari Sutra Disemadi, 2022). Primary legal materials in this research are: Law No. 30 of 2014 concerning Government Administration (UU AP), Laws that discuss related to PTUN, and Perma PMH 2019. Secondary legal materials are books, journal articles, and research results that discuss Policy Regulations. Non-legal materials are language dictionaries to clarify the meaning of difficult terms in this research. The analysis of legal materials is carried out qualitatively-prescriptively and the approaches used are conceptual and statutory approaches.(Negara, 2023).

## 3. Results and Discussion

### **Standards and Parameters Related to Testing Policy Regulations Based on Discretionary Authority**

Policy Regulations are substantially a form of formalization of public policies formulated to accommodate the needs of the community (Syafrijal Latief, 2022). The rapidly evolving needs of the community certainly require the formulation of fast and precise technical rules to accommodate the needs of the community (Eduard Awang Maha Putra, Gatot Dwi Hendro Wibowo, 2020). Therefore, the presence of Policy Regulations is intended as an effort to regulate quickly to meet the needs of a society that is developing massively and quickly. Even though the form has similarities with laws and regulations, Policy Regulations have three substantial differences with laws and regulations, namely: First, Policy Regulations are public policies that are formulated quickly in response to the development of society and to succeed in the implementation of government administration(Novianti et al., 2024). Because they are formulated quickly, the orientation of Policy Regulations is only formulated in certain conditions and times and can be changed as needed. This is certainly different from laws and regulations that must be formulated in a planned manner and as much as possible difficult to change unless there

is a legal need of the community or the provisions of higher laws and regulations that require it(Taufik, Sri Suatmiyati, 2022).

Second, Policy Regulations as a response to the needs of society do not have to be based on laws and regulations. This confirms that the orientation of the formulation of Policy Regulations is based on the *doelmatigheid* aspect, which refers to the needs and orientation of society or the teleological aspect(Zainal Arifin, Naufal Ghani Bayhaqi, 2024). Because it is based on the *doelmatigheid* aspect, the Policy Regulation is not obliged to refer to statutory regulations and must refer to AUPB(Sudjati & Cahyandari, 2022). This distinguishes it from the formulation of laws and regulations that must be based on higher regulations(Irfani, 2020). Third, Policy Regulations are based on discretion which is the free authority of the Official who formulates the Policy Regulations(Firmansyah & Widodo, 2022). Discretionary authority in state administrative law is understood as part of *freies ermessen*, namely a form of "free" authority from Officials in the field of State Administration whose orientation is "*naar buiten gebracht schricftelijk beleid*", namely as a form of manifesting in writing a policy product(Luh et al., 2023). The aspect of free authority related to this aspect of discretion does not mean absolute freedom or freedom but freedom in this case relates to the creativity of Officials to formulate Policy Regulations that are in accordance with the needs of the community so that their formation can be considered more relaxed than the rules of law(Listiyanto et al., 2021). In this context, it is common that Policy Regulations as a product of discretionary authority must be based on and refer to AUPB. This is different from the formulation of laws and regulations where the drafting process must be specific and optimally planned, unlike Policy Regulations which can be formulated spontaneously.

From the three distinguishing aspects between Policy Regulations and laws and regulations above, it can be concluded that in general the substance of the difference between Policy Regulations and laws and regulations is in the basic aspect of authority where Policy Regulations are based on discretionary authority. The term discretion itself in terms of linguistic aspects actually comes from the English language, namely "discretion power" which lexically means the power to act freely(Charda, 2024). The term "discretion power" is

actually identical to the duties of the executive or State Administrative Officials because in carrying out their duties and authorities they are related to the realities of everyday life of the community (Latif & Chariansyah, 2024). In Indonesian Language, discretion is understood as a form and effort to make their own decisions related to certain situations that are being faced (KBBI, 2023). Judging from the linguistic aspects above, Article 1 number 9 of the AP Law actually emphasizes the discretionary aspect which details that discretion is actually an effort to overcome government stagnation, especially when the laws and regulations are legally vague, unclear, and do not regulate certain aspects that factually occur in a society and require a quick response.

Referring to the aspect of discretion as the main aspect in the formulation of a Policy Regulation, the validity of a discretion needs to pay attention to three aspects, namely: authority, substance, and procedure. (Taufiqurrahman, 2024). In the aspect of authority, it is emphasized that discretion can only be exercised by an authorized official. This confirms that other than authorized officials cannot exercise discretion. On the substance aspect, it needs to be seen that even though discretion is a "free authority", it must still refer to AUPB. AUPB here according to Ridwan HR is interpreted broadly, including legal principles that are not specifically emphasized in the AP Law (Ridwan Ridwan HR, 2018). This is also reinforced by Jazim Hamidi's view that the characteristics of AUPB as a legal principle are positioned as "meta-norms" or outside positive law (Rauf, 2021) (Umami et al., 2022). Referring to this aspect of substance, Policy Regulations originating from discretion must refer to AUPB which is a legal principle. On the procedural aspect, it needs to be seen that even though Policy Regulations are formulated quickly as a response to public needs, they must still be subject to certain procedures regulated in internal regulations in each institution.

From the description above, it can be concluded that even though Policy Regulations are formulated quickly and based on *freies ermesen*, they must be based on AUPB and must pay attention to aspects of authority, substance and procedure. In relation to Policy Regulations, Perma PMH 2019 actually emphasizes the expansion of the authority of the PTUN in adjudicating, including adjudicating aspects of PMH committed by Officials. Substantially,

Perma PMH 2019 was formulated to follow up on the AP Law which oriented fundamental changes relating to the authority of the PTUN in adjudicating (Winarsi, 2024). This is also related to the substance of the AP Law which categorizes State Administrative actions or actions not only in written form, but also includes factual actions (Sudjati & Cahyandari, 2022). The main orientation of the AP Law is to provide legal protection for the community by providing authority for the community to be able to challenge any State Administrative actions or actions, including factual actions that harm the community (Fitri, 2021).

Although in general Perma PMH 2019 has oriented legal protection for the community by providing testing efforts for every State Administrative action or action, including factual actions that harm the community, there are weaknesses in Perma PMH 2019 related to the formulation of policy regulations, especially related to the standards and parameters of testing Policy Regulations. Referring to the extensive interpretation, it can be seen that Perma PMH 2019 places Policy Regulations as State Administrative actions or acts in written form, so that if they harm the public, they can be tested at the PTUN on the basis of PMH by Officials. The absence of standards and parameters for testing Policy Regulations actually implies a form of denial of the aspects of justice which is detrimental to the community.

The standards and parameters for testing Policy Regulations with reference to the AP Law and Perma PMH 2019 must actually be based on several aspects, such as: first, the standards and parameters for testing Policy Regulations fundamentally refer to the AUPB. In this aspect, the AUPB needs to be linked to the losses experienced by the community so that it can become a touchstone for Policy Regulations. Second, the standards and parameters for testing Policy Regulations must refer to the concept of PMH in civil law which is applied in the field of state administrative law, namely that the Policy Regulations being tested must have implications for direct harm to the community, including various forms of Policy Regulations that are contrary to positive law and aspects of propriety in society. Third, the standards and parameters for testing Policy Regulations must pay attention to aspects of authority, substance, and procedures so that Policy Regulations must be made by authorized

institutions, appropriate substance, and certain procedures that must be followed.

### **Political Law related to Testing Policy Regulations Based on Substantive Justice**

Problems related to the testing of Policy Regulations are actually based on the absence of special provisions in Perma PMH 2019 which specifically emphasize the testing of Policy Regulations(Nur, 2023). The aspect of testing Policy Regulations based on Perma PMH 2019 is actually based on an extensive interpretation that categorizes Policy Regulations as State Administrative actions or actions that are written and are the authority of the PTUN to test them(Atmaja, 2022). The lack of specific regulation on the testing of Policy Regulations, especially in Perma PMH 2019, actually has implications for the realization of aspects of justice in society. This is because justice is an essential aspect in the idea of the rule of law(Prasetio, 2024).

In relation to the aspect of justice, the regulation of testing Policy Regulations, it is necessary to understand that in legal science there are various ideas about justice. In general, legal science can be divided into two ideas of justice, namely the idea of procedural justice and substantive justice(Fahamsyah & Disantara, 2022). Procedural justice is justice obtained through certain procedures and mechanisms so that to get justice it is necessary to fulfill and comply with these procedures and mechanisms(Oltra Gras, 2021). This idea of procedural justice is relevant to legal practices that are not related to the fundamental rights of the community because with this procedural justice, the fulfillment of justice must also accommodate certain procedures, processes, and mechanisms(Radziewicz, 2022). In contrast to the idea of procedural justice, substantive justice emphasizes the essence of justice as an important part of the law so that the law can present the substance and essence of justice (just law) for the community(Ilham Yuli Isdiyanto, 2023). If procedural justice emphasizes the fulfillment of certain procedures and processes in realizing justice, in substantive justice, procedures and processes can be skipped and even must be changed if they do not bring the substance of justice to society. Procedures and processes in substantive justice are positioned as a means so that if procedures and processes hinder the

fulfillment of substantive justice, then procedures and processes must be reviewed so that substantive justice can be implemented appropriately for the community (Andriawan, 2022).

Referring to Satjipto Rahardjo's view, the fulfillment of substantive justice in society has several main characteristics, namely (Rahardjo, 2012): First, substantive justice must accommodate non-legal aspects in addition to legal aspects. Substantive justice must be viewed holistically and comprehensively so that in certain legal cases the problem must be described optimally so that both legal and non-legal aspects must be described comprehensively (Sari, 2020). Second, substantive justice must be oriented to a particular context. In this aspect, the context and problems faced must be one of the important orientations of substantive justice. Context in this case is an understanding that places the law in full, including the theoretical aspect and practical aspect (Shambhavi Goswami, Sharma, 2020). This also emphasizes that in realizing substantive justice, the context must be understood that the law is not only in the form of laws and regulations (based on rules), but must also refer to the legal behavior of the community (behavior aspect) (Purwanto & Zarkasih, 2024). Third, substantive justice must emphasize the "substance" aspect of justice so that what is emphasized is how justice can be enjoyed by the community optimally without differentiating a community's access to the law, including without looking at the social stratification of certain communities (Sundari et al., 2022).

From the three characteristics of substantive justice above, it should be understood that substantive justice emphasizes the substance and essence of justice that can be applied specifically in society. In relation to the aspect of testing Policy Regulations in relation to efforts to realize substantive justice, it should be noted that the importance of the substance of substantive justice in testing Policy Regulations is because in essence Policy Regulations are formulated through discretionary policies based on the free authority of State Administrative Officials. Because it is based on discretion, the formulation of Policy Regulations is certainly not specifically based on certain laws and regulations (Mulyawan et al., 2020). To ensure that a Policy Regulation is in accordance with its designation and does not conflict with laws and

regulations, the substantive justice aspect is needed so that the Policy Regulation does not have implications for harm in society.

Another important aspect related to the examination of a Policy Regulation is that it is necessary to explore and deepen related to AUPB. As a fundamental principle in state administrative law, AUPB is something that needs to be considered in relation to Policy Regulations (Zamroni et al., 2020). In the formulation of Policy Regulations, AUPB must be placed as a guide so that the substance of the Policy Regulations must be based on AUPB or at least not contrary to AUPB. In the aspect of testing Policy Regulations, judges at the PTUN must also comprehensively explore the AUPB to test the validity of a Policy Regulation. The function of AUPB to test the validity of a Policy Regulation is relevant to the view of Ronald Dworkin who emphasizes that legal principles have a function to be applied, especially when there are hard cases or legal cases that tend to be difficult and their resolution requires an approach and deepening of relevant principles (Mahfud, 2019) (Rosadi & Marwan, 2020). Testing Policy Regulations in certain contexts can lead to hard cases because as a product of discretionary authority, Policy Regulations are not based on positive law but must be tested by something above positive law, which in this case is a legal principle in the form of AUPB.

The importance of AUPB in the process of testing Policy Regulations in order to realize substantive justice actually requires legal political efforts so that substantive justice can be realized in testing Policy Regulations. Legal politics in terms according to Mahfud MD's view is the lines of legal policy in which certain laws are chosen with an orientation to realize state goals (Christiana Sri Murni, Fradhana Putra Disantara, 2023) (Mahfud MD, 2017). Mahfud MD's view on legal politics is also in line with Bellefroid's view regarding legal politics where Bellefroid identifies legal politics as a series of efforts to formulate ideal law (*ius constituendum*) into applicable law (*ius constitutum*) (Purwanto & Zarkasih, 2024). Efforts to formulate ideal law (*ius constituendum*) into applicable law (*ius constitutum*) can be done through various means such as legal discovery by judges or through legal formation by the legislature (Wahab & Bachmid, 2024).

In connection with efforts to test Policy Regulations so that substantive justice can be realized from the political aspect of law, what can be done is related to the revision of Perma PMH 2019 to provide special arrangements related to testing Policy Regulations including confirmation of the standards and parameters of testing Policy Regulations. Apart from the revision of Perma PMH 2019, it can also be done by issuing a separate Perma related to the testing of Policy Regulations. Referring to the aspects of legal certainty, effectiveness, efficiency, and efforts to realize substantive justice, the revision of Perma PMH 2019 to provide special arrangements related to the testing of Policy Regulations including confirmation of the standards and parameters of testing Policy Regulations is actually more appropriate. In addition to summarizing the types of Perma within the scope of the Supreme Court and facilitating socialization efforts, the revision of Perma PMH 2019 to provide special arrangements related to the review of Policy Regulations including confirmation of the standards and parameters of testing Policy Regulations is also more appropriate because it unites the review of Policy Regulations as part of the review of Unlawful Acts by the government so as to facilitate the legal process and in an effort to orientate towards substantive justice.

From the description above, it can be concluded that the legal politics related to testing Policy Regulations based on substantive justice, namely the need to revise Perma PMH 2019 to provide special arrangements related to testing Policy Regulations including confirmation of the standards and parameters of testing Policy Regulations. The revision of Perma PMH 2019 is intended to streamline the review of Policy Regulations as part of the review of Unlawful Acts by the government so as to facilitate the legal process and in an effort to orientate substantive justice.

#### **4. Conclusion**

There are three standards and parameters for testing Policy Regulations, they are: first, the standards and parameters for testing Policy Regulations fundamentally refer to the AUPB: First, the standards and parameters of testing Policy Regulations fundamentally refer to the AUPB. In this aspect, the

AUPB needs to be linked to the losses experienced by the community so that it can become a touchstone for Policy Regulations. Second, the standards and parameters for testing Policy Regulations must refer to the concept of PMH in civil law which is applied in the field of state administrative law, namely that the Policy Regulations being tested must have implications for direct harm to the community, including various forms of Policy Regulations that conflict with positive law and aspects of decency in society. Third, the standards and parameters for testing Policy Regulations must pay attention to aspects of authority, substance, and procedures so that Policy Regulations must be made by authorized institutions, appropriate substance, and certain procedures that must be adhered to.

Legal politics related to testing Policy Regulations based on substantive justice, namely the need to revise Perma PMH 2019 to provide special arrangements related to testing Policy Regulations including confirmation of the standards and parameters of testing Policy Regulations. The revision of Perma PMH 2019 is intended to streamline the testing of Policy Regulations as part of the testing of Unlawful Acts by the government so as to facilitate the legal process and in an effort to orientate substantive justice.

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